

Audiovox Communications Corp. and American Service and Industry Union, Local 350, Petitioner. Case 29-RC-8778

May 6, 1997

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The National Labor Relations Board has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent portions are attached as an appendix). The request for review is granted solely with respect to the issue of whether cellular phone technicians are technical employees.¹ Having reviewed the pertinent portions of the record, the Board finds that the technicians are not technical employees.

Technical employees are those "who do not meet the strict requirements of the term 'professional employee' as defined in the Act but whose work is of a technical nature involving the use of independent judgment usually acquired in colleges or technical schools or through special courses." *Barnert Memorial Hospital Center*, 217 NLRB 775, 777 (1975), quoting *Liton Industries of Maryland*, 125 NLRB 722, 724-725 (1959). In the instant case, although the Employer prefers that the technicians have technical school training, it is not required. At least 5 of the 32 technicians were previously employed in other departments of the Employer (customer returns, customer service parts, and warehouse) and then became technicals after receiving on-the-job training. Except for identifying weekly technical training sessions by engineers for technicians, customer relations employees, and parts employees, the record does not elaborate on the nature and extent of the on-the-job training. There is no evidence that the technicians have to be licensed or certified, or pass any exams. Moreover, only four to six of the technicians are trained to diagnose problems, it appears that some technicians primarily perform soldering work, and technicians as a group earn substantially less than engineers.

Accordingly, the Board reverses the Regional Director to the extent that he implicitly finds that the techni-

cians are technical employees, as the Board defines that term. However, based on the Regional Director's factual findings, we agree with the Regional Director that the petitioned-for employees share a community of interest separate from the excluded employees and therefore constitute an appropriate unit for bargaining. The request for review is denied in all other respects.

APPENDIX

DECISION AND DIRECTION OF ELECTION

The Petitioner herein, American Service and Industry Union, Local 350, seeks an election in a unit of all full-time and regular part-time cellular phone technicians employed by the Employer at its Hauppauge facility, excluding all other employees, guards and supervisors as defined in the Act. The petitioned-for unit would consist of approximately 32 technicians. The Employer contends that an appropriate unit must encompass its entire plant operation, including technicians, warehouse employees, engineering employees, customer returns employees, parts employees, customer service employees, warehouse clerical employees, engineering clerical employees, and plant clerical employees, but excluding all other employees, office clerical, employees, supervisors and guards. The plantwide unit proposed by the Employer would consist of approximately 105 employees. The parties stipulated that sales employees and office clerical employees should be excluded from any unit found appropriate herein.

In support of its position regarding the unit issue, the Employer relies on the testimony of its president and CEO, Philip Christopher. The Petitioner was not represented by counsel at the hearing, and did not present any witnesses to testify. The Petitioner has indicated its willingness to proceed to an election in any unit found appropriate herein.

Overview of Employer's Operations and Facility

As noted above, the Employer's business involves cellular telephones and related products. The record reveals that the Employer does not actually manufacture the products. Rather, the Employer designs products, develops specifications for them, and negotiates with various overseas manufacturers to manufacture them. The Employer then performs quality control, imports the products, warehouses them, and sells and distributes them to other companies (nonretail sale). In some cases, the Employer must "manipulate" the manufactured products according to customers' specifications, such as affixing the customer's label to the products.⁵ Ultimately, after the products have been sold by the Employer's commercial customers to the individual consumers, the Employer performs warranty service and repairs on the products when necessary. All of these functions, both before and after manufacture, take place at the Employer's Oser Avenue facility in Hauppauge, New York.

The northern quarter of the facility,⁶ facing Oser Avenue, contains the "front office" functions of administration, accounting, accounts payable, credit, and sales. The approximately 40 employees who work in the front office are not

¹ Review was requested of the Regional Director's finding that (1) the petitioned-for unit of cellular phone technicians at the Employer's facility constitutes an appropriate unit and (2) the Regional Director's implicit finding that the cellular phone technicians are technical employees. The Regional Director presumed in his discussion of whether cellular phone technicians constitute an appropriate unit that the technicians are technical employees, but did not specifically set forth his factual basis for this implicit finding, or make an explicit finding. The Regional Director also did not discuss whether the two engineers in the facility, stipulated not to be professional employees, should be included in a technical unit. See *Westinghouse Electric*, 300 NLRB 834 (1990); and *PECO Energy Co.*, 322 NLRB 1074 (1997).

⁵ The process of "product manipulation" is described in more detail below.

⁶ See Emp. Exh. 2, a blueprint of the Oser Avenue facility.

in issue in this case. They have their own entrance at the northwest corner of the facility. There is a continuous wall between the front office and the plant area, with only one passageway between the two.

The remaining three-quarters of the Employer's facility (i.e., everything south of the front office area) is considered the "plant" area. Immediately below the front office is a small engineering area, where two engineers work along with an engineering clerical employee. The engineering employees are supervised by Vice President of Engineering Paul Wilkinson. The middle portion of the plant, supervised by National Service Manager Andy Corrigan and other supervisors,⁷ generally contains the service-related functions. The employees who work under Corrigan include the 32 technicians, 20 customer returns employees, 11 parts employees, 15 customer service employees, and 1 plant clerical/customer service employee. The southernmost portion of the plant contains the warehouse and shipping/receiving areas, supervised by Shipping Manager Lefteris Eliades and Assistant Vice President of Warehouse Andy Ioannou. There are 21 warehouse employees and 2 warehouse clericals employed in this area of the plant. All plant employees park their cars in a lot on the southern side of the facility. All plant employees enter and exit through the same "plant entrance" at the southeast side of the facility. All plant employees use the same cafeteria and restrooms in the plant, which the office employees generally do not use.

Specific Departments and Duties

The Employer's president, Philip Christopher, testified that warehouse and shipping/receiving employees⁸ perform primarily manual labor. No particular education or experience is necessary. The warehouse employees handle goods that are received at the Employer's loading dock or through a drive door, both located on the southern side of the facility. For example, when newly manufactured products or parts are received (as opposed to postsale products being returned for service), warehouse employees first bring the products to an area in warehouse for random quality control testing. They unpack some of the new products and, after the technicians perform quality control tests, warehouse employees repack the products and store them in the warehouse racks. Warehouse employees also bar-code all new products received at the plant. When customers place an order, warehouse employees "pick" the ordered products from the warehouse, and prepare them for shipping to the customer.

⁷ There are three supervisors who work directly under Corrigan: Customer Service Manager Christine Spinella, Operations Manager Deidre Kern, and Technician Manager Young Mo. The parties stipulated that the four individuals named in the paragraph above (Wilkinson, Corrigan, Ioannou, and Eliades) and the three individuals who work directly under Corrigan (Spinella, Kern, and Mo) are all supervisors as defined in Sec. 2(11) of the Act, and must, therefore, be excluded from any unit found appropriate herein. The record indicates that Wilkinson, Corrigan, and Ioannou's duties include interviewing and hiring employees, firing employees, and determining employees' wage increases. The record indicates that Spinella, Kern, Mo, and Eliades' duties include making recommendations regarding wage increases, and that Mo's duties include interviewing technician applicants.

⁸ The warehouse, shipping, and receiving employees will be referred to collectively as "warehouse employees."

When defective products are returned for repair, warehouse employees bring the products over to the customer returns area and, after the repair, bring the products back to the warehouse/shipping area. The equipment used by these employees for warehouse work includes forklifts and bar-coding machines.⁹ The warehouse employees are directly supervised by Shipping Manager Lefteris Eliades, who reports to Assistant Vice President of Warehouse Andy Ioannou. The two warehouse clericals work in an office in the southeastern corner of the facility. The less experienced warehouse clerical spends all of her time in the shipping office, typing labels, shipping documents, filing, printing out "pick tickets" from the computer for orders, and scheduling deliveries. The more experienced warehouse clerical spends some time in the shipping office performing those tasks, but also travels to other parts of the plant, for example, to trace lost shipments via the customer service department or other departments. Both warehouse clerical employees have daily contact with all of the warehouse and shipping/receiving employees.

The engineering employees¹⁰ design new products and develop specifications for the manufacturers. They, along with technicians, also test the products, and are responsible for quality control. Engineering employees train technicians to diagnose and repair the telephones; engineering employees and technicians, in turn, also train the technicians at 1500 service centers in the United States and South America who are authorized to make repairs for Audiovox.¹¹ At weekly meetings assembled by Service Manager Corrigan in the plant cafeteria, engineering employees also give information to technicians, customer service employees, and parts employees, such as how to operate and repair certain telephones, and what parts are going to be needed for repairs. Christopher testified that the two current engineering employees are technical school graduates, and that they worked as technicians (at other companies and then for the Employer) before "moving into" engineering. The engineering clerical employee (who used to work in customer service) helps to coordinate information between customer service, technicians, and engineering; responds to faxed inquiries from service centers and manufacturers; and handles paperwork related to certain "clearances" required by the Federal Communications Commission and the Cellular Industry Trade Association. As noted above, the engineering employees work in an engineering area just below the front office, and are supervised by Vice President of Engineering Paul Wilkinson.

In between the warehouse area and the engineering area are the service-related areas supervised by Service Manager Corrigan. They include 15 customer service employees, whose immediate supervisor is Customer Service Manager Christine Spinella, who in turn reports to Corrigan. The customer service employees respond to customers' calls and faxes. They tell customers how to operate and program their cellular telephones. For example, if a customer cannot figure

⁹ The warehouse employees' use of other equipment in connection with their performing certain assembly line work is discussed separately below.

¹⁰ The parties stipulated that the engineering employees are not professional engineers.

¹¹ Although the Employer subcontracts some repair work to these authorized service centers, Christopher testified that the "bulk" of repair work is done at the Oser Avenue facility.

out how to "unlock" his phone, a customer service employee will give the customer instructions (e.g., push zero-zero on the keypad) for that particular model. If the cellular phone is not working, the customer service employee will discuss with the customer whether to send it in for repair. The customer service employees also order parts and accessories for customers; process the charges for customers whose repairs are out of warranty; check on the status of repairs; and process payments to the authorized service centers when they make repairs. Customer service employees receive on-the-job training from engineers and technicians, to learn about the various telephone models, and they attend the weekly service meetings to keep informed as to various problems or issues that may arise. They spend approximately 50-60 percent of their time talking to customers on the phone in the customer service area of the plant. They also go into other areas of the plant to get information, such as asking warehouse employees if certain parts or accessories are still in stock for an older telephone model. If customer service employees cannot answer a customer's question, they may have to go ask the technicians or engineering employees for an answer. The customer service employees fill out daily reports showing the number of calls and complaints they received. There is also a customer service/plant clerical employee who spends most of her time servicing walk in customers who come to the Oser Avenue facility for telephone repairs or parts. This customer service/plant clerical employee also acts as a receptionist and typist for Service Manager Corrigan.

The Employer's service operations also include 20 "customer returns employees" who work primarily in areas (called areas "5" and "7") between the technicians' benches and the parts storage. It appears from the record that they are also supervised by Spinella. Their work is related to products that have been returned to the plant for repair. Specifically, once customer service employees have talked to customers about sending products back for repair and have generated a repair document (such as a warranty work order), and once the warehouse/shipping employees have physically transported the boxes of returned products to the customer returns area, the customer returns employees then "process" the returns for repair. This entails opening the boxes, and checking to make sure that the products inside match the corresponding work order or packing slip. If for some reason the returned products do not match the documentation, the customer returns employees must check with customer service. At some point, the customer returns employees also barcode all returned products. After this initial processing, the customer returns' employees give the products to technicians for the actual repairs. After the technicians finish the repairs, the customer returns employees pick up the products, and repackage them for shipping back to the customers.

The Employer's service operations also include 11 parts employees, whose direct supervisor is Operations Manager Deidre Kern, who in turn reports to Corrigan. Parts employees work in areas (called areas "8" and "12") located roughly in the middle of the plant, between the customer service/returns area and the warehouse/shipping areas. The nine parts employees who work in area 8 generally maintain the Employer's inventory of parts. From a "parts window" between area 8 and the customer returns area, the parts employees give technicians the parts they need for repairs. The

2 parts employees who work in area 12 are responsible for the purchase of parts. Parts employees consult with technicians and engineers to ascertain what parts will need to be ordered, and they also attend the weekly service meetings for that purpose. Customer service employees and the customer service/plant clerical employee can also place orders for customers' parts via the parts employees.

The 32 technicians whom Petitioner seeks to represent report directly to Technician Manager Young Mo, who in turn reports to Corrigan. Mo interviews technician applicants, although Corrigan must approve any hiring. Mo also makes recommendations to Corrigan regarding the technicians' wage increases. Thirty of the technicians work in an area (called area "4," between the engineering area and the customer returns areas) where there are several rows of technicians' workbenches. For some reason that is not entirely clear from the record, two technicians work in another area (area 9) adjacent to the parts inventory area (area 8). As noted above, technicians test, diagnose, and repair products that have been returned by customers. Once they receive the returned products from the customer returns employees, they perform whatever repair is required. If necessary, they order parts from the parts employees, using a parts requisition form. Technicians also fill out a form for each returned product, showing what repair was made and what parts were needed. They also fill out a daily report showing the total number of units they repaired and what parts they used. Copies of these reports go to Mo. As previously noted, technicians' duties also include: assisting the engineering employees in testing prototypes of new products; training technicians at the authorized service centers; performing quality control tests of new products when they arrive in the warehouse/shipping area; giving information to customer service employees so that they can answer customers' questions; and attending weekly service meetings in the cafeteria. There is no evidence in the record to indicate how much time the technicians spend doing actual repairs, as opposed to other tasks. As for technicians' training, Christopher first testified that the employer "requires some kind of a technical school" (emphasis added). But Christopher then went on to say that technical school is merely "preferable," and that, as long as applicants have some kind of technical background or experience, they could be trained to work on the Employer's telephone products. Of the 32 current technicians, at least 5 were previously employed in other departments (customer returns, customer service, parts, and warehouse) and then became technicians after receiving on-the-job training. Different technicians specialize in repairing different types of telephones. Thus, if customer service employees have a question about a particular model, they have to ask the technician who specializes in that model. Not surprisingly, new technicians are usually assigned to the simpler models, whereas experienced technicians are assigned to more complicated models. The equipment used by technicians includes testing and diagnostic equipment (e.g., Marconi testers), soldering guns, microscopes for examining circuit boards, and screwdrivers. Christopher testified that other employees also use this same equipment, which the technicians train them to use. However, the exact circumstances and extent of other employees' use of this equipment is not clear from the record.

Now that each department's distinct functions have been summarized separately, and some interrelation of those functions has been indicated, we turn to the testimony regarding circumstances in which employees from different departments may actually work side by side. Christopher generally explained the processes of "product manipulation," that is, when purchase orders come from various telephone carriers, the product must be "manipulated" according to the customers' specifications. Manipulations include cosmetic changes (e.g., putting a NYNEX label on each telephone), packaging changes (e.g., repackaging the product in Bell Atlantic boxes), mechanical changes (e.g., inserting a certain number of batteries), or programming changes (e.g., preprogramming the telephone with the customer's telephone number). Some of these manipulation projects apparently involve disassembling and reassembling the phones.

Unfortunately, Christopher's testimony was somewhat unclear in that he did not specify which employees perform which processes.¹² Christopher testified that any plant employee can volunteer to work on these projects, most of which take place weekdays after 5 p.m. or on Saturday, if they want to earn overtime and help complete the job. Employees from all plant departments (including technicians, parts, customer returns, and warehouse/shipping) work together on these projects. The Employer sets up assembly tables in various areas of the plant—usually in certain warehouse areas, but sometimes in the parts department. Although Christopher first testified that the technicians perform the programming changes (Tr. 79), he later added that warehouse employees also "use the programming machines" (Tr. 179). He testified that technicians teach warehouse employees and parts employees how to use the same equipment that the technicians use. It is not clear from the record how much manipulation involves different, specialized tasks along an assembly line, or how much of it involves all employees performing the same task. Finally, Christopher's testimony was totally unclear as to how often these manipulation projects occur. At certain points, he testified that most manipulations are done after hours (i.e., weekdays after 5 p.m., or Saturdays), and that they occur approximately three times per week (Tr. 179, 181, 260). However, at other points, Christopher testified that these projects occur every day (Tr. 182, 197). In short, although the record clearly indicates that technicians work side by side with other plant employees on these projects, it is unclear exactly who does what, to what extent technicians perform any unique functions in this context, how often the projects occur, and how much time technicians spend working on these projects at the assembly tables, as opposed to the repair work they perform at their work benches.

Other Evidence Regarding Plant Employees

As for employees' earnings, Christopher gave the following testimony. Customer returns employees earn between \$270 and \$420 per week, depending on seniority. Parts employees earn between \$270 and \$540 per week, depending on seniority. The inexperienced warehouse clerical employee earns \$280 per week, whereas the other warehouse clerical employee (who has 15 years of seniority) earns \$700 per

week. The plant clerical and engineering clerical employees earn between \$400 and \$450 per week. The customer service employees earn between \$300 and \$400 per week. Technicians earn between \$280 and \$580 per week, depending on seniority and qualifications. The warehouse employees earn between \$280 and \$800 per week. (Some warehouse employees have as much as 25 years of seniority.) The two engineers earn between \$700 and \$800 per week.

Christopher testified that all rank-and-file plant employees must wear Audiovox "polo" shirts or sweatshirts. The plant supervisors generally wear business attire, although Technician Manager Mo (who sometimes works as a technician) sometimes wears an Audiovox sweatshirt.

As noted above, all plant employees use the same parking lot and entrance on the southern side of the Oser Avenue facility, and use the same cafeteria and bathrooms in the plant. They all have the same identification cards. All plant employees receive the same benefits, such as a 401(k) plan, and the same vacation time and bereavement leave. All plant employees work the same regular hours (8:30 a.m. to 5 p.m.), and have the same lunchtime and breaktimes. All plant employees are eligible to participate in the same Christmas party, employee recognition day, employee-of-the-month event, annual conference, and various committees (e.g., safety committee, blood drive).

Discussion

It is well established that a certifiable bargaining unit need only be an appropriate unit, not the most appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), enf'd, 190 F.2d 576 (7th Cir. 1951); *Omni International Hotel of Detroit*, 283 NLRB 475 (1987); *P. J. Dick Contracting*, 290 NLRB 150 (1988); and *Dezcon, Inc.*, 295 NLRB 109 (1989). The Board's task, therefore, is to determine whether the petitioned-for unit is an appropriate unit, even though it may not be the only appropriate unit or the "ultimate" unit. The Board has stated that, in making unit determinations, it looks "first to the unit sought by the petitioner. If it is appropriate, our inquiry ends. If, however, it is inappropriate, the Board will scrutinize the employer's proposal." *Dezcon, Inc.*, supra, 295 NLRB at 111. Thus, the unit requested by a petitioner is the starting point for any unit determination. Furthermore, although Section 9(c)(5) of the Act provides that the extent of union organization shall not be the "controlling" factor, it is certainly a factor that the Board considers, in conjunction with other factors. *Central Power & Light Co.*, 195 NLRB 743, 746 (1972).

Where a petitioned-for bargaining unit is limited to technical employees, the Board has customarily found such units to be appropriate, since technical employees tend to share distinctive training and functions. *Vickers, Inc.*, 124 NLRB 1051, 1053 (1959); *United Shoe Machinery Corp.*, 185 NLRB 200 (1970); and *Harron Communications*, 308 NLRB 62 (1992). In order to insist on an alternative unit, an employer must first prove that the petitioned-for unit of technical employees is an inappropriate unit based on the their strong community of interests with other employees.

In the instant case, Audiovox has submitted evidence showing that a plantwide unit would be a perfectly appropriate bargaining unit. For example, the record clearly shows that plant employees in different departments have frequent contact with each other, due to the interconnected nature of

¹² For example, Christopher testified that "we" attach NYNEX labels (Tr. 78).

their jobs and the physical proximity of their work sites within the plant. (Cf. *Harron Communications*, supra, where the cable-television technicians worked at outside jobsites, whereas the customer service representatives did not.) For the sake of argument, it might even be conceded that a plantwide unit would be *more* appropriate than a technicians' unit. However, as stated above, the Act does not require a union to seek the "most" appropriate unit. *Omni International Hotels of Detroit*, supra. Rather, a certifiable unit need only be an appropriate unit.

Based on the record evidence herein, I find that the petitioned-for unit limited to technicians is *an* appropriate unit for bargaining. The record indicates that technicians employed by Audiovox possess a higher level of technical training and skills than other plant employees, except of course for the engineering employees. The fact that technicians sometimes share technical information (e.g., by teaching other employees how to use technical equipment when necessary, and by explaining the telephones' operations to customer service employees) only serves to underscore their higher level of technical knowledge. Furthermore, technicians work in a distinct area of the plant, using their distinct work benches, and filling out distinct repair forms. The record contains no evidence that other employees use the technicians' work benches or fill out the repair forms. In addition, technicians are separately supervised by Technician Manager Mo who, for example, makes recommendations regarding their wage increases. *Omni International Hotels of Detroit*, supra at fn. 1 (importance of separate "immediate" supervision for unit determinations). Finally, I note that since the Petitioner seeks to represent technicians separately, union organizing has apparently been limited to technicians. Although the extent of organizing cannot be the controlling factor, it is *an* additional factor to consider. *Central Power & Light*, supra. The evidence submitted by the Employer, including the ambiguous testimony regarding technicians' role in assembly line work, does not indicate such an overwhelming community of interest between technicians and other plant employees as to mandate the other employees' inclusion in the unit.

In short, although the evidence submitted by the Employer suggests the appropriateness of a plantwide unit, it does not

demonstrate that a unit limited to technicians is *inappropriate*. Rather, the technicians' superior technical knowledge, their separate supervision and other factors mentioned above demonstrate that the petitioned-for technicians' unit indeed constitutes an appropriate bargaining unit. *United Shoe Machinery*, supra, 185 NLRB at 200 (petitioned-for units of all technical employees "customarily" found appropriate).

The Employer correctly points out that in a 1981 decision involving the Employer's parent corporation, Audiovox Corp. (Cases 29-RC-5307 and 29-RC-5318), this office included automotive-sound technicians in a "wall to wall" unit. In that case, Local 819, International Brotherhood of Teamsters, had sought to represent a unit which included shipping and receiving employees, drivers, assistant technicians and others at one of Audiovox Corp.'s two facilities, but which excluded technicians. In addition to finding that an appropriate unit had to include both of Audiovox Corp.'s facilities (both Marcus Boulevard and Arkay Avenue in Hauppauge, New York), it was found that the technicians must be included in the larger unit. This finding was based in part on the fact that assistant technicians (whom the union sought to include) performed the same radio repair work as technicians, and were supervised by the same supervisor. Thus, the prior decision involved a different employer, different facilities, different issues, a different union, and a different petitioned-for unit. The Employer in the instant case, Audiovox Communications Corp., did not even exist at the time of the decision 16 years ago. Furthermore, this Employer does not employ "assistant technicians." In short, the facts and issues involved in the prior case are very different from the instant case. My decision in this case, therefore, is not controlled by the prior case.

Accordingly, I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time technicians employed by the Employer at its Hauppauge, New York facility, but excluding all other employees, guards and supervisors as defined in the Act.